

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RYAN W. PAYNE,

Defendant.

Case No.: 2:16-cr-46-GMN-PAL

ORDER

Pending before the Court is Defendant Ryan W. Payne's ("Defendant's") Objection (ECF No. 1069) to Magistrate Judge Peggy A. Leen's Order (ECF No. 997) entered on November 18, 2016, denying Defendant's Motion to Compel and for Order to Cease and Desist Recording (ECF Nos. 727, 735), Motion to Impound Government Evidence (ECF No. 734), and Motion for Appointment of Special Master (ECF No. 736). The Government filed a Response to Defendant's Objection. (ECF No. 1154).¹

I. BACKGROUND

On March 2, 2016, a federal grand jury sitting in the District of Nevada returned a Superseding Indictment charging Defendant and eighteen other co-defendants with sixteen counts related to a confrontation with Bureau of Land Management (BLM) Officers in Bunkerville, Nevada, on April 12, 2014. (ECF No. 27).

Defendant is currently in pretrial detention at CCA-Pahrump pending trial. (Order 3:9-10, ECF No. 997). Defendant's Motions center on his belief that CCA-Pahrump is recording

¹ On December 8, 2016, co-defendant Steven A. Stewart ("Stewart") filed a Motion for Joinder (ECF No. 1085) to Defendant's Objection (ECF No. 1069). Pursuant to District of Nevada Local Rule IB 3-1(a), any objections to a magistrate judge's order must be filed within 14 days of service. Stewart's Motion for Joinder was not filed within the 14-day deadline to be considered as an Objection to Judge Leen's Order. Accordingly, the Court denies Stewart's Motion for Joinder (ECF No. 1085) as untimely.

1 pretrial detainees' telephone conversations with their attorneys and sharing these recordings
2 with the U.S. Attorney's Office ("USAO") for the District of Nevada. (*Id.* 3:10–12).
3 Specifically, Defendant's Motion to Compel argues that the Court should compel the
4 Government to produce any recordings from CCA-Pahrump related to Defendant, while also
5 requesting that the Court order CCA-Pahrump to cease and desist recording privileged
6 attorney-client telephone communications. (Mot. to Compel 4:14–18, ECF No. 727).
7 Defendant's Motion to Impound Government Evidence asks the Court to order the Government
8 to produce all such recordings from CCA-Pahrump to the Court and "instruct all those to whom
9 such recordings have been made available that they must immediately refrain from listening to
10 such recordings." (Mot. to Impound 3:18–4:3, ECF No. 734). Lastly, Defendant seeks the
11 appointment of a special master to look into CCA-Pahrump's attorney-client telephone
12 recording policies. (Mot. to Appoint Special Master 1:22–2:1, ECF No. 736).

13 In her Report and Recommendation, Judge Leen found:

14 Payne's speculation that CCA-Pahrump may be recording attorney-client
15 communications based on an unrelated District of Kansas case and information
16 from an unidentified CJA panel member in an unidentified case in this district is
17 insufficient to warrant the relief requested. The government affirmatively
represents that it has no recordings of conversations between Payne and his
counsel, or between Payne's co-defendants and their counsel.

18 (Order 6:25–7:2). Based on these findings, Judge Leen denied Defendant's Motions. (*Id.* 7:3–
19 8).

20 **II. LEGAL STANDARD**

21 When reviewing the order of a magistrate judge, a district judge should only set aside
22 the order if it is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); D. Nev. R. IB
23 3-1(a). A magistrate judge's order is "clearly erroneous" if the court has "a definite and firm
24 conviction that a mistake has been committed." *See Burdick v. Comm'r IRS*, 979 F.2d 1369,
25 1370 (9th Cir. 1992). "An order is contrary to law when it fails to apply or misapplies relevant

1 statutes, case law or rules of procedure.” *Global Advanced Metals USA, Inc. v. Kemet Blue*
2 *Powder Corp.*, Case No. 3:11-cv-793-RCJ-VPC, 2012 WL 3884939, at *3 (D. Nev. 2012).
3 When reviewing the order, however, the magistrate judge “is afforded broad discretion, which
4 will be overruled only if abused.” *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446
5 (C.D. Cal. 2007) (citation omitted). The district judge “may not simply substitute its judgment”
6 for that of the magistrate judge. *Grimes v. City & Cty. of San Francisco*, 951 F.2d 236, 241 (9th
7 Cir. 1991).

8 **III. DISCUSSION**

9 Defendant asserts several objections to Judge Leen’s Order. (Obj., ECF No. 612). First,
10 Defendant argues that Judge Leen erred by “ignor[ing] the significance of counsel’s
11 representation . . . that CCA-Pahrump had recorded privileged attorney-client communications
12 and provided them to the USAO.” (*Id.* 8:25–9:1). Second, Defendant asserts that Judge Leen
13 erred in “rel[ying] on the government’s statement that neither it nor the ‘prosecution team’ had
14 any attorney-client phone calls in its possession.” (*Id.* 9:8–9). Finally, Defendant contends that
15 Judge Leen erred by “fail[ing] to address [Defendant’s] request for a cease-and-desist order.”
16 (*Id.* 9:14–15).

17 Having reviewed the record before Judge Leen and the subsequent briefing of the
18 parties, the Court finds that Judge Leen’s Order was not clearly erroneous or contrary to law.
19 Neither Defendant’s Motion nor his Objection provide sufficient support for this Court to
20 determine otherwise. In his Objection, Defendant relies on *United States v. Kincade*, Case No.
21 2:15-cr-071-JAD-GWF, a pending case in the District of Nevada where the defendant is
22 similarly in pretrial custody at CCA-Pahrump and the Government produced telephone
23 recordings from CCA-Pahrump. (Obj. 10:7–11:8). In *Kincade*, however, Magistrate Judge
24 George Foley, Jr. similarly denied the defendant’s Motion to Compel and for Order to Cease
25 and Desist. (Order, *United States v. Kincade*, Case No. 2:15-cr-071-JAD-GWF (D. Nev. Nov.

1 11, 2016), ECF No. 184). First, Judge Foley relied on the Government’s representations that it
2 had already produced all requested recordings. (*Id.* 1:19–21). Second, Judge Foley explained
3 that because CCA-Pahrump was not a party to the case, a cease and desist order “in this matter
4 [was] not the appropriate avenue to achieve that relief.” (*Id.* 2:2–5).

5 Here, Defendant argues that because there were attorney-client recordings in *Kincade*,
6 “CCA-Pahrump likely is recording all calls made by detainees like [Defendant].” (Obj. 11:16).
7 Such a link is too tenuous without any further evidence that recordings are being made and
8 used in this case too. In *Kincade*, the Government produced the recordings, whereas here, the
9 Government insists that none exist. (*See* Gov’t Resp. 4:6). Defendant asserts that Judge Leen
10 erred by believing the Government’s representations but “dismissing [defense] counsel’s
11 representations as unfounded without any basis for doing so.” (Obj. 11:20–21). However, by
12 denying the motion as “insufficient to warrant the relief requested,” Judge Leen was not
13 impugning defense counsel’s good faith belief in bringing the motion, but rather, she found that
14 defense counsel’s good faith belief alone was mere speculation and without more was simply
15 not sufficient evidence to satisfy Defendant’s burden of proof, especially when countered by
16 the Government’s good faith representations to the contrary. Judge Leen’s finding is further
17 supported by the fact that Defendant did not even provide *Kincade* or its case number for Judge
18 Leen’s review, although the mere fact that recordings were produced in *Kincade* is not
19 determinative of any recordings in this case.

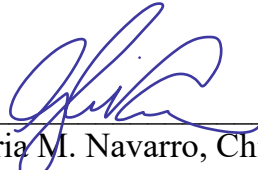
20 Accordingly, the Court finds that Judge Leen did not clearly err and Defendant’s
21 Objection (ECF No. 1069) is overruled.

22 **IV. CONCLUSION**

23 **IT IS HEREBY ORDERED** that Defendant Ryan Payne’s Objection (ECF No. 1069)
24 is **OVERRULED**.

1 **IT IS FURTHER ORDERED** that Steven A. Stewart's Motion for Joinder (ECF
2 No. 1085) is **DENIED**.

3 **DATED** this 22 day of December, 2016.

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7 Gloria M. Navarro, Chief Judge
8 United States District Court
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